

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEFFREY J. FORRED
Claimant

VS.

VIA CHRISTI REGIONAL MEDICAL CENTER
Self-Insured Respondent

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Docket No. 1,048,272

ORDER

Claimant appeals the February 10, 2010, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was found to have suffered accidental injuries which arose out of and in the course of his employment with respondent on October 9 and October 16, 2009. Claimant was being provided authorized medical treatment by respondent. The ALJ determined that claimant was not entitled to temporary partial disability compensation (TPD). No reason was given.

Claimant appeared by his attorney, Steven R. Wilson of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, Eric K. Kuhn of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held February 4, 2010; and the documents filed of record in this matter.

ISSUE

Did the ALJ exceed her jurisdiction by refusing to award TPD pursuant to K.S.A. 44-510e(a)?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should remain in full force and effect and the appeal by claimant should be dismissed.

This matter came before the ALJ for a preliminary hearing on February 4, 2010. It was stipulated that claimant suffered an injury while working for respondent and claimant

was being provided medical treatment, with Dr. Poole as the authorized treating physician. Respondent was willing and able to provide accommodated work for claimant. But, claimant was in too much pain and had to leave the job from time to time and go home. Claimant was requesting TPD for the periods claimant was unable to remain at work. No doctor had taken claimant off work; it was just claimant's decision to remove himself from the employment. Claimant did not testify at this preliminary hearing. The evidence came as proffers from the attorneys for both claimant and respondent.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues that based on the strict construction language contained in *Bergstrom*,¹ an administrative law judge has no choice but to award TPD whenever a claimant suffers a reduction in income, regardless of the reason.

Respondent argues, first, that the Board is without jurisdiction to decide this matter on appeal from a preliminary hearing. Respondent also argues that *Bergstrom* does not address TPD, but is limited to the good faith issue under K.S.A. 44-510e. The ALJ, in denying TPD, gave no reason or insight into the denial. Respondent also alleges that K.S.A. 44-534a does not provide for TPD, only temporary total disability.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?²

¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

² K.S.A. 44-534a(a)(2).

This Board Member finds that an administrative law judge has the jurisdiction to make a determination as to what benefits a claimant would be entitled to at a preliminary hearing. The Board, however, is limited in its scope of review on an appeal from a preliminary hearing. Here, the issue as to claimant's entitlement to TPD is not an issue over which the Board has jurisdiction on an appeal from a preliminary hearing order. The ALJ did not exceed her jurisdiction in issuing the denial.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Board does not have jurisdiction of a dispute regarding claimant's entitlement to TPD on an appeal from a preliminary hearing order. Claimant's appeal of this matter is dismissed. The matter can be determined at the time of the final award.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 10, 2010, should remain in full force and effect. Claimant's appeal of this matter is dismissed.

IT IS SO ORDERED.

Dated this ____ day of April, 2010.

HONORABLE GARY M. KORTE

c: Steven R. Wilson, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge

³ K.S.A. 44-534a.